EDITOR'S NOTE

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89-1807

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

TERM _____

RONALD E. BROWN,

Appellant,

vs.

THE CITY OF SEATTLE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO REVIEW A DECISION FROM THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Counsel for Appellant
JEAN SCHIEDLER-BROWN
Law Offices of Jean Schiedler-Brown
and Associates, P.S.
606 Post Avenue, Suite 101
Seattle, WA 98104
(206) 223-1888

QUESTIONS PRESENTED

1. It is a violation of the 5th,6th,and 14th amendment right to counsel for an arresting officer to repeatedly elicit incriminating information after the defendant asserted right to remain silent and to counsel;

2. It is a violation of the 14th Amendment right to due process and of the 6th Amendment to deny defense motion to dismiss or for a continuance, when the prosecutor disobeyed court order to produce discovery, falsely misled the court as to the nature and existance of the documents, and disregarded defense expert's sworn statement that the documents were necessary to prepare a defense.

PARTIES

The parties or the proceeding are listed in the caption of the case herein.

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JURISDICTIONAL GROUNDS

A decision affirming a Municipal Court judgement was rendered on July 5, 1989 by the King County Superior Court; Reconsideration of that decision was denied July 14, 1989. Discretionary review was declined by the Court of Appeals on October 18, 1989 and by the State of Washington Supreme Court on March 20, 1990. The statutory provision relied upon conferring jurisdiction to this court to review the judgement by writ of certiorari is 28 USC 1257.

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment 5.

(Appendix 5)

Constitution of the United States, Amendment 6.

(Appendix 5)

Constitution of the United States, Amendment 14, Section 1.

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STATEMENT OF THE CASE

SUMMARY

This is a case where a DWI (Driving While Intoxicated) suspect was purposefully interrogated when he asserted his right to remain silent and requested his attorney. The resulting evidence was used at trial to convict him. It was the only direct evidence of the alleged use of intoxicants, as defendant had refused a field of sobriety test and a breathilizer test.

Defendants planned to demonstrate that the road conditions, and not intoxication, caused the accident. Defense expert presented a sworn statement that certain engineering data would be needed to prepare a safety analysis. The court ordered the city to produce the data, but the prosecutor failed to do so, falsely claimed all records were produced, falsely claimed to not understand the specific request, and falsely represented facts to the court.

In reliance on the prosecutor's false statements, the trial court denied defense motion to dismiss or for a continuance.

Defendant's first trial was a hung jury; he was convicted of DWI and negligent driving after a second trial.

MIRANDA PROCEDURE: Defendant Brown refused sobriety tests at the accident scene and asserted a desire to consult his attorney. He informed the officer that she was on her way to the accident scene. RP 5/19/88 at 37,38

Brown was taken to the police station and Mirandized. RP 5/19/88 at 41, lines 1 --2. The officer suggested Brown call another lawyerbut Brown replied he wanted to speak to his lawyer who was en route. Id. at 30.

This incident occurred outside usual office hours; the officer suggested Brown call a public defender,but offered no telephone number. Id. The Officer

continued to evoke incriminating statements from Brown. Brown was not mirandized again. Instead, the officer waited 15 to 20 minutes. Then he asked Brown to proceed with the tests. He convinced Brown to proceed by promising to bring Brown's lawyer as soon as she arrived.

Brown never initiated communication with police and he never retracted his request to speak with his lawyer. (Id. at 30, 31, 42.)

The responses to the interrogation were utilized to fill out an Alcohol Information Report (AIR), which was admitted at trial. (Proceedings before Judge Bernstein 8/16/88 pg. 1-5.) Among other statements, Brown admitted to having two drinks of bacardi and eoke, andbelieved that it was 11:00 PM when it was really 8:10 PM. Brown refused to take other sobriety tests. (Id. at p.7.)

DISCOVERY PROCEDURE

The defense submitted a general discovery request dated May 25, 1988 as follows:

"4. All records, and files, regarding accidents, complaints, and repairs to the street at or near the intersection where the accident occurred."

These were not produced. Following is a chronology of subsequent attempts to obtain discovery:

April 14, 1988: A subpoena duces tecum was issued by defense counsel to the records custodian for "Any and all documents or records containing facts relating to this matter, particularly any all records or documentation of accidents, complaints, repairs, lighting, changes in road configuration, or in any other records whatsoever relating to the vicinity of 2500 Blk. E. Montlake Pl. E., Seattle, WA." The prosecutor informed defense counsel that a court order would be necessary to produce the

documents. (Decision of Counsel, 6/2/88, p.1., paragraph 3.)

May 4, 1988: Pretrial hearing, at which the court expressed the expectation that these items would be produced, or, if not, a subpoena woud be issued.

May 19, 1988: The court signed a subpeona for the above- listed discovery. The subpoena was served per the City Attorney's instructions. The caption erroneously stated,"Superior Court", and not, "Municipal Court."

May 27, 1988: Counsel for the City refused to comply with the subpoena, after defense counsel verbally clarified the caption and offered a continuance to allow time to receive the documents. (Id., p.3. paragraph 9.)

June 3, 1988: Defense's first motion to dismisss. The Prosecutor opposed the discovery, claimed confusion about the subpoena's erroneous caption, and asserted that there was not enough time to comply

with the subpoena. The court ordered the City to comply with the subpoena by June 8, 1988. (RP 6/3/88)

June 8, 1988: An 8 page computer summary of accident and sign data was given to Defensa Counsel. No documents regarding maintenance, repair, complaints, traffic volume, or underlying source documents were produced.

June 17, 1988: Defense renewed motion to dismiss for failure to produce. Defense presented the Declaration of Robert Johnson, safety and traffic engineering expert, verifying that source documents and not computer summaries were necessary for him to prepare a safety analysis of the area.

The prosecutor denied there were any additional documents available. The trial court suggested the issue be solved by subpoening a witness from the Engineering Department to set forth documents in existence responsive to the subpoena. (RP 6/17/88)

June 20, 1988:The prosecutor represented that he had confirmed with the Engineering Department that no further documents existed.

Defense counsel made an offer of proof that she had subpoenaed Engineering personnel who would testify that all data requested did exist in the Engineering Department. (RP 6/20/88, Tape # 88-3119)

June 20, 1988The trial court took testimony from subpoeaned Engineering Department personnel who verified that data on traffic volumes, traffic studies, speed studies, travel time studies, maintenance records on traffic control devices and traffic signs, were all maintained. Furthermore, copies of all accident reports and source documents for the summary computer printout were available. They could not be accessed through any other department becaue the Engineering department used its own number index and catagorized

continued to invoke incriminating statements from Brown. Brown was not mirandized again. Instead, the officer waited 15 t0 20 minutes. Then he asked Brown to proceed with the tests, convincing him to proceed by promising to bring the lawyer to see him as soon as she arrived.

Brown never initiated communication with police and he never retracted his request to speak with his lawyer. Id, at 30,31,42.

The interrogation was utilized tofill out an Alcohol Information Report (AIR), which was admitted at trial. Proceedings before Judge Burnstein 8/16/88,pp 1--5. Among other statements, Brown admitted to having 2 drinks of bacardi and coke, and believed it was 11:oo PM when it was really 8:10 PM. Brown refused to take any other sobriety tests. Id at 7.

by accident location. The department would produce the data, but only if the prosecutor directed them to do so. RP 6/20/88 Tape # 88-3131.

The court ordered the documents produced. The documents were not produced prior to the first trial, because the defendant refused to waive speedy trial. The result was a hung jury and charges were immediately refiled.

July 19, 1988: Defense counsel demanded by letter to the prosecutor that the subpoena and court order be complied with. Defense counsel also learned that the scene of the accident had been repaved and demanded supplemental discovery of all tests, materials used in repaving, criteria in determining what roads to repave and any other information relating to the decision to repave the road.

On or about July 21: Defense counsel

spoke to the prosecutor by telephone and reiterated that she expected the documents, as identified by the City's own Engineering Personnel, to be produced.

No documents were produced.

August 11, 1988: Defense brought a motion to dismiss for failure to provide discovery and for prosecutorial misconduct. The prosecutor directly misled the court and misrepresented facts before the court; a judge with no background in the prior proceedings was on the bench.

The prosecutor specifically stated the following:

1. Accused defense counsel of abusing the court process by demanding discovery "ad nauseum," and by deceiving the court to obtain a dismissal. RP 8/11/88.

2. Falsely represented, contrary to prior Engineering personnel destimony, that the accident reports were available from other sources. He claimedthat Engin-

eering personnel had said this was true, when the opposite was true because the Engineering department kept a separate numbering system, uniquelly coded to the location of accidents. RP 8/11/88.

3. Falsely represented, contrary to the prior meticulous record and his one admission on the record, that he had no idea what documents existed in response to the subpoena, or what specifically was being requested. RP 8/11/88. Previously when asked by the court if he was clear on what documents existed in response to the subpoena, he had told the court that "everything's been clarified" RP 6/20/88.

The judge, who had not held any of the previous hearings in the case, believed the prosecutor's false representations. It ruled that the subpoena was "too vague for anybody to produce."

ROP 8/11/88.

The motions were denied and a continuance was denied. Trial began on Monday, August 15 and Brown was convicted of DWI and negligent driving on August 16, 1988. Documents were never produced.

QUESTIONS TIMELY RAISED ON APPEAL

The Constitutional issues herein were timely raised as follows:

1. IN the brief of Appellant in the King County Superior Court, pp 20--23; 28.

2. In the Motion for Discretionary Review in tne State Court of Appeals, issues 1,2, and 3, treated in the Commissioner's ruling denying Discretionary Review.

3. In the Petition for Review to the State Supreme Court, pp 8,9,13,15,16.

ARGUMENTATION

ISSUE I: IT IS A VIOLATION OF THE 5th, 6th, and 14th amendment right to counsel for the arresting officer to repeatedly elicit incriminating information after the defendant asserted Miranda rights to remain silent and to counsel; the case must be dismissed or reversed and evidence supressed.

Generally, in-custody interrogation is coercive, even if apparently friendly. When an accused invokes the right to remain silent, all questioning must cease. State v. Corethan 684 P2d 355, 38 W App 231 (1984). Further questioning does not waive the right to counsel. (1981) State v. Coles 625 P2d 713, 28 W App 563. The right to have counsel at interrogation is indispensible to protection of the privilege against

self incrimination. Miranda v. State of Arizona (1966) 86 S. Ct. 1602, 384 U.S. 436, 16 L. Ed. 2d 694, reh den. 875 S. Ct 11, 385 U.S. 890, 17 L. Ed. 2d 121.

Questioning after assertion of Miranda rights may resume only after a significant period of time and only if there is a fresh set of Miranda warnings on requestioning. Failure to observe these processes violates the 5th Amendment to the U.S. Constitution.

The 6th amendment to the U.S. Constitution, Right to Counsel, extends to "drunk driving" charges. State v. Carmod 140 Vt. 631, 442 A 2d 1292. The right to counsel is violated if defendant is interrogated regarding a crime after he states that he does not want to discuss the matter until he talks with a lawyer. Robinson v. Percy (CA Wis 1984) 738 F 2d 214.

The right to assistance of counsel is also an essential requirement of due process, provided for under the 14th Amendment to the U.S . Constitution. U.S. Ex Rel Konigsberg v. Vincent DCNY 195, 388 F. Supp 221, Aff'd 526 F 2d 131, cert den 96 S Ct 2656, 426 U.S. 937, 49 L. Ed. 2d 388.

Review should be accepted in this case because the Washington courts' decision violated the key guarantees as embodied in the above-cited caselaw. That caselaw is representative of State and Federal case law which has developed since the historic Miranda decision, cited above. The Washington Court violated the principles of that decision, and violated that principle as expressed uniformly in decisions of other States and federal courts. It violated, most distastefully, those principles as expressed

in Washington State Case Law. *

Specifically, in this case, defendant's assertion of the right to remain silent ws not scrupulously honored. In fact, the officer proceeded, in the inherently coercive environment of a jail cell, to cajole Brown to make statements. The officer deliberately tried to make

* The ruling denying Petition for Review in the State Supreme Court, Appendix A, refers to the court's belief that the transcript of the suppression hearing, the "3.5" hearing, was not in the original court record on review. This is an error on the part of the court. Because review was not accepted, the actual Superior court record was not before the court and thus the court was evidently confused. In any event, in its ruling the court found that "[T]he officer also may have improperly questioned Mr. Brown about the crime after he requested counsel." , but neatly skirted the Constitutional issue by determining that the statements made were not "significant." Brown admitted he was drinking, and failed to know what time of day it was. As he refused the breathalizer test, these admissions were the backbone of the prosecution's case.

Brown change his mind by promising to bring the attorney "right back" when she arrived. See State v. Wheeler 108 W 2d 230, 737 P2d 1005 (1987). Coercion is presumed if deliberate elicitation occurs once Miranda rights are asserted. State v. Franklin 48 W. App 681, 739 P2d 1047 (1987).

Where evidence is obtained in violation of the Constitution, there is no need to balance the benefit of exclusion against the cnsequesnces of exclusion, and reversal/suppression is therefore mandated. State v. Bonds 653 P 2d 1024, 98 W 2d 1 cert den 104 S Ct 111, 464 U.S. 831, 78 L. Ed. 2d 112 (1982). Accord, State v. Aydelotte 665 P 2d 443, 35 W App 125 (1983).

The State court erred--this is a "significant" issue. A person was convicted utilizing direct inculpatory evidence in violation of his right to counsel.

The U.S. Supreme Court is Brown's court of last resort, and for him, these guarantees are "significant." They are "significant " only if every citizen can be sure that they are, indeed, enforcable rights, in State as well as federal court.

ISSUE II: IT IS A VIOLATION OF THE 14TH Amendment right to due process to deny defense motion to dismiss and/or for a continuance, when the prosec disobeyed direct court order to produce discovery, falsely misled the court as to the nature and existance of the documents, and disregarded expert's statement that the documents were necessary to prepare a defense.

Production of evidence safeguards the defendant's right to Due Process. U.S. v. Friedman 593 F2d 109 (C.A. Wash. 1979).

Delays or prevention of preparation of a defense by the prosecutor is also a violation of the 6th Amendment. See: U.S. v. Solomon 753 F 2d 1522 (1985); U.S. v. Saunders 641 F 2d 1980 cert den 110 S Ct 3055, 452 U.S. 918, 69 L. Ed. 2d 422 (1980); State v. Hernik

698 P 2d 573 (1985). A deliberate attempt to impede the defense violates speedy trial rights. State v. Tucker 32 W App 908, 651 P 2d 220 (1980).

Deliberate misrepresentation by a prosecutor of matters of fact which deny the defendant a fair opportunity to prepare for trial may constitute such unfair, dishonest, and ignoble conduct as to deny due process of law. State v. Kahim (1972) 498 P2d 635, 53 Haw 536, cert den 93 S. Ct. 944, 409 U.S. 1126, 35 L. Ed. 2d 253.

Due process requires the prosecution to disclose material evidence, upon request by defendant , when evidence would tend to exculpate defendant. Ex Parte Womak (Ala 1988) 541 So. 2d 47, on remand, 541 So. 2d 74.

It is denial of due process for a prosecutor to withhold from the defense any evidence favorable to the accused.

Hamilton v. Jamieson D.C. Ps (1973), 355 F. Supp 290. State v. Taylor (Tenn, 1989) 771 S.W. 2d 387. This is true regardless of the prosecutor's good faith or bad faith. U.S. v Hart ACMR 1989 27 M.J. 839.

Failure to disclose, for instance, a videotape which may have been exculpatory if it contained certain facts, was a violation of defendant's right to due process in Ex Parte Dickerson (Ala 1987) 517 So. 2d 628, on remand 517 So 2d 631. Thus, if the information existed but was never disclosed, it must be presumed exculpatory or favorable if it could have been such.

Evidence is material if there is a probability sufficient to undermine confidence in the oytcome, that the result of the trial would have been different. Landano v. Rafferty (DNJ 1987) 670 F. Supp 570, Recon. Den 675 F. Supp 204, Aff'd 856 F2d 569.

Suppression or destruction of evidence warrants dismissal of charges against a defendant. State v. Palmer (Mont 1983) 673 P2d 1234.

The worse the conduct of the Prosecutor, the less prejudice to the accused is needed for reversal. Simos v. Gray D.C. Vis 1973, 356 F Supp 265.

In this case, the Washington court turned a blind eye to the blatant and dishonest conduct of the City prosecutor. Not only did the City fail to obey the court order to produce data, but by doing so it, and only it, retained possession of the data in question. The State court seems to reject Brown's appeal because he could not prove the exact contents of the discovery. HE could not prove the contents, becausethe discovery was in the exclusive possession of the City and because after more than 100 days and repeated motions, demands,

hearings, and other court proceedings, the State court fialed to enforceits own ruling awarding discovery to the defendant. It deprived the defendant of discovery when the prosecutor's case was already weak, as evidenced by the first hung jury.

In this case, the State has made a sham out of due process. The State Court opions veritably yawn and avoid comment on the prosecutor's evasiveness and lies. The prosecutor is rewarded by the State court ruling for his disobedience of court orders and other dishonest and ignoble acts.

In extraordinary attempt to make a record of the nature of discovery, defendant called a hearingto prove to the court the data was available, and offered an expert who needed the data to prepare a road safety study. Road conditions were his prime defense against

the criminal charges of drunken driving and negligent driving. This was seen as material by the trail court, and it was ordered produced on several occasions. (The judge who finally denied the dismissal had not been on the bench for the prior orders.)This suspect trial outcome surely would have been affected by a safety study of a road that was repaved shortly after the accident in question.

This issue should be accepted for review. It presents a compelling factual scenario for review in that it reaches to the very heart of the issue of due process in discovery. It presents the situation where the defense can prove that a wealth of specific documents exist, but cannot prove their factual content because they are jealously held back by a self-serving prosecutor.

It is violative of every due process notion to allow the opposing party to edit or choose what discovery to supply.

Yet the Washington court begged the question by dismissing the discovery as "not material." IN doing so, it contradicted the orders of its own Municipal court level judges who ordered the discovery.

The specificity, the numerous rulings, and the well developed record are aspects of this case that have been lacking in other cases reviewed by this court, when the court was forced to conclude that discovery requests were too vague or there was not an adequate record to support the assertion that specific evidence existed. This issue should be reviewed as a blueprint for establishing parameters for the conduct of defense counsel and a mode of developing a record when defense counsel needs to establish the existance of necessary documents.

CONCLUSION

Both of the questions presented herein, the in-custody interrogation and the prosecutorial misconduct, should be reviewed by this court.

The facts are of shocking boldness; the State court ruled opposite established caselaw, and oppositeadmitted violations of permissable in-custody interrogation and blatant refusal to enforce the discovery orders of the lower courts.

Review of this case will not only address an injustice for the individual Brown, but it will clarify that the U.S. Supreme Court does not tolerate trial by ambush in any State or local jurisdiction.

The court is respectfully requested to accept certiorari.

DATED this 17th day of May, 1990.

Jean Schiedler-Brown

Attorney for Petitioner

CITY OF SEATTLE,	)	IN THE COURT OF APPEALS
Respondent,	)	FOR THE STATE OF
v.	)	WASHINGTON, DIV I
RONALD BROWN,	)	
Petitioner.	)	

No. 24641-1-I

COMMISSIONER'S RULING DENYING

DISCRETIONARY REVIEW

Petitioner Ronald E. Brown seeks discretionary review of the RALJ decision affirming his convictions in Seattle Municipal Court of driving while under the influence and reckless driving. Petitioner has filed a motion for discretionary review; the City has filed a response in opposition. The motion was set for oral argument.

RAP 2.3(d) provides that review of a superior court decision entered in a proceeding to review a decision of a

court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sonctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

In his motion for discretionary review

Brown presents five issues which he contends meet these criteria:

(1) It was error for the trial court to deny the motion to dismiss when the arresting officer repeatedly elicited incriminating information after the defendant asserted Miranda rights to remain silent and to counsel.

(2) It was error for the trial court to deny defense motion to suppress in custody statements of defendant, solicited by the arresting officer without fresh Miranda warnings after defendant had asserted Miranda rights.

(3) It was error to deny defense motion to dismiss when the prosecutor disobeyed court order to produce discovery, and falsely mislead the court as to the existence of the documents, the factual

nature of the documents, and the prosecutor's knowledge of the documents, when the discovery was revelant and the defense expert needed the information in order to prepare a defense.

(4) It was error to exclude data from trial, which was produced by the engineering department, when it was admittedly authentic, and the prosecutor had control over the foundational data and had refused to produce it.

(5) It was error to permit the prosecutor to testify that defendant had been offered other sobriety tests and refused them, and to allow the prosecution to argue this in closing.

In the RALJ decision, however, the trial court only considered issue 3, the discovery issue stating "[t]hat the record provided by the appellant is insufficient——

for the court to decide the remaining issues raised by appellant. A continuance to supplement the record is denied."

Brown asserts that all issues are appropriate for review since he subsequently provided the superior court with suficient record in a motion for reconsideration which was denied. In the order denying reconsideration the trial court merely found "good cause to reaffirm" the previous order on RALJ appeal. There is no formal decision of record relating to any of the issues presented other than the issue concerning discovery. According to the City's response to the motion for discretionary review, the record is still too incomplete to review the isues presented sonce Brown has not provided the complete pretrial and trial record. Since it does not appear that the trial

court considered the issues and the full record has not been prepared, issues 1,2,4,and 5 do not warrant acceptance of discretionary review pursuant to the criteria of RAP 2.3 (d).

AS it relates to the discovery issue and the denial of Brown's motion to dismiss, it does not appear that there was prosecutorial misconduct justifying a dismissal. Nor has Brown demonstrated the required showing of materiality required under the discovery rules justifying the sanction of dismissal for failure to disclose. AS the court held in State v. Gonzalez 110 WN.2d 738, 750, 757 P.2d 925 (1988), a defendant must make a showing beyond a mere possibility that the evidence soughtmight have helped the defense or might have affected the outcome of the trial. There must be a plausible showing that the evidence would have been material to the defense. In reviewing the limited

transcripts of the various municipal court hearings it is clear that the ultimate decision by Judge Yanick denying the motion to dismiss for alleged discovery violations was based upon the lack of specificity concerning the request and a lack of showing of materiality. In the original notice of deposition and subpoena duces tecum jBrown sought any and all records or documentation ofaccidents, complaints, repairs, lighting, changes in road configuration, and any other records whatsoever relating to the cicinity of the 2500 block of East Montlake Place East, Seattle, WAshington. Brown has not demonstrated how any such evidence would be material to his defense to the charges. Accordingly, the trial court didnot abuse its discretion.

In sum, the Superior Court decision affirming the municipal court's decision is neither in conflict with a case in this court or the Supreme Court nor has

Brown presented a significant question of Constitutional law or an issue of public interest. Brown has not presented an issue which warrants review within the criteria of RAP 2.3 (d). Accordingly, the motion for discretionary review is denied. Now therefore it is hereby

ORDERED that the motion for discretionary review is denied.

Done this 18 day of October, 1989.

LARRY A. JORDON

Court Commissioner

SUPERIOR COURT OF WASHINGTON

COUNTY OF KING

CITY OF SEATTLE,

Plaintiff-respondent

vs.

RONALD E. BROWN

Defendant-appellant

- - - - - - -

No. 88-1-04583-2

DECISION ON RALJ APPEAL

This appeal came on regularly for oral argument on 7--5, 1989, pursuant to RALJ 8.3, before the undersigned judge of the above entitled court and after reviewing the record on appeal and considering the writtena nd oral argument of the prties, the court holds the following:

Reasoning regarding assignment of Error: That JUdge Yanick did not err by denying defendant's motion to dismiss

based upon the alleged discovery violations; that the record provided by appellant is insufficient for the court to decide the remaining issues raised by appellant. A Continuance to supplement the record is denied.

IT IS HEREBY ORDERED that the above cause is AFFIRMED; REMANDED to Municipal court for reimposition of sentence in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the lower court after assessing statutory Clerk's fees and costs.

DATED 7 - 5 - 89

MARCIA PECHMAN
JUDGE

Jean Schiedler-Brown
Counsel for Appellant

_____
Counsel for Respondent

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

RONALD E. BROWN,

Appellant,

vs.

THE CITY OF SEATTLE,

Respondent

- - - - - - -

No. 88-1-04583-2

ORDER ON RALJ MOTION FOR RECONSIDERATION

The above entitled court having heard a motion for reconsideration filed by appellant, This court has reviewed all pleadings and papers previously on file in this matter, including defendant's motion for reconsideration and attached excerpts from the proceedings below. Based on the foregoing, this court has considered its order entered on the 5th

day of July, 1989, and finds good cause to reaffirm that order.

IT IS HEREBY ORDERED that Appellant's motion for reconsideration is denied.

DATED July 14, 1989.

JUDGE Marsha J. Pechman

THE CITY OF SEATTLE,) IN THE SUPREME COURT
Respondent,) FOR THE STATE OF
v.) WASHINGTON
RONALD E. BROWN,)
Petitioner.)

NO. 5 6 8 5 3 - 7

RULING DENYING MOTION FOR
DISCRETIONARY REVIEW

In August Of 1988, Ronald Brown was convicted in Seattle Municipal Court of reckless driving and driving while under the influence of intoxicants. In his RALJ appeal to Superior Court, Mr. Brown raised several issues, including a claim that charges should have been dismissed because the prosecutor had violated discovery orders. The Superior Court rejected Mr. Brown's discovery argument; it declined to address his remaining claims, however, because the record he had provided was insufficient to permit their consideration. Mr. Brown's motion for discretionary review, again raising several issues, was denied by

the Court of Appeals. Mr Brown now seeks review by this court.

Mr. Brown's pleading to this court is captioned a "Petition for Review," and it refers to the review criteria set forth in RAP 13.4(b). A party may petition for review only of a Court of Appeals' decision "terminatin review," however, and such a decision can only be made after review is accepted. RAP 12.3(a)(1). The Court of Appeals' refusal to review a Superior Court's RALJ decision terminating review. Review by this court is therefore available only by motion for discretionary review. RAP 13.5. Mr. Brown's "petition" will be treated as such a motion. RAP 13.3(d).

For the reasons explained below, Mr. Brown has not shown that the Superior Court's decision merited review under any of the criteria set forth in RAP 2.3(d), or, therefore, that the Court of Appeals' denial of review constitutes obvious or

probable error under 13.5(b).

Mr. Brown first claims the municipal court should have either dismissed the charges or supressed certain inculpatory statements because the arresting officer continued interrogating him after he asserted his right to counsel. The Superior Court did not address this issue because Mr. Brown did not provide that court with a transcript of the CrRLJ 3.5 hearing. As Commissioner Jordan noted in his ruling denying review by the Court of Appeals, it is the appellant's obligation to provide the appellate court with sufficient portions of the record to permit review of the assignments of error. RALJ 6.3A(a), (c); State v. Garcia, 45 Wn. App. 132, 140, 724 p.412 (1986).

When he moved to modify Commissioner Jordan's ruling, Mr. Brown provided the Court of Appeals with transcript exerpts from the CrRLJ 3.5 hearing. Nonetheless, this material was not part of the Superior Court record, and the Superior Court made

no decision as to any issues it may reveal. The partial transcript therefore does not support Mr. Brown's assertion that the Superior Court's decision should be revieweed to remedy a conflict with decisions of this court. See RAP 2.3(d)(1).

Nor was the Court of Appeals required to review the Superior Court's decision simply because Mr. Brown identified a possible constitutional issue. Review of any RALJ decision is discretionary, RAP 2.2(c), and RAP 2.3(d)(2) refers to "significant" questions of constitutional law. Nothing about Mr. Brown's "interrogation" presents a novel ar significant constitutional question.

The portion of the record now available shows the officer properly required Mr. Brown to decide whether to take the breathalyzer test after giving him an opportunity to telephone the public defender's office. See State v. Staeheli, 102 Wn. 2d 305, 309, 685 P. 2d 591 (1984);

State ex rel Juckett v. Evergreen Dist. Ct., 100 Wn. 2d 824, 831, 675, P. 2d 599 (1984). His refusal to take the breathalyzer test was admissable under RCW 46.61.571. State v. Long, 113 Wn. 2d 266, 778, P 2d 1027 (1989) (limiting State v. Zwicker, 105 Wn. 2d 228, 713 P. 2d 1101 (1986)), which Mr. Brown cites, to cases arising under pre- 1986 statute). Although the officer also may have improperly questioned Mr. Brown about the crime after he requested counsel, see Edwards v. Arizona, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981), Mr. Brown still has not provided the record which would be necessary to determine whether his generally innocuous answers affected the outcome of trial.

Mr. Brown also challenges the Superior Court's resolution of the one issue that court did decide on the merits--whether the prosecutor's alleged violation of a discovery order requires dismissal of the charges. I find no error in the lower courts'

disposition of this issue. Defense counsel requested the City Engineer to produce "any and all information reguarding complaints, accidents, street repairs, reports regarding street hazards or change or repair of street signs. . . for the past two years" along the city block on which Mr. Brown was arrested. When defense counsel objected that she had not received "everything," the prosecutor offered to go with her to the engineering department "right now" and "do my best to get whatever she thinks she wants." Mr. Brown has not shown that any unavailable documents were relavent and material to his defense.

The motion for discretionary review is denied.

Dated at Olympia, Washington, March 22, 1990

Geoffrey Brooks
COMMISSIONER

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT 14 TO THE UNITED STATES CONSTITUTION, SECTION 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the Unites States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without dur process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2)

NO. 89-1807

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

OCTOBER TERM 1990

RONALD E. BROWN,

Petitioner,

vs.

THE CITY OF SEATTLE,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO REVIEW A DECISION FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MARK H. SIDRAN
City Attorney

MICHAEL J. FINKLE,
Assistant City Prosecutor
Counsel of Record
with Michael W. Brown,
Frances P. Wagner,
Charlotte E. Clark-Mahoney
Assitant City Prosecutors

Seattle City Attorney
710 Second Avenue, Suite 1414
Seattle, Washington 98104
Telephone: (206) 684-7757

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I. COUNTERSTATEMENT OF THE CASE.

The defendant in this case was charged with and convicted of driving while under the influence of intoxicants or drugs. The charges were initiated after he drove onto a curb and smashed his car into a guard rail, and another car. He made several motions before trial including a motion to suppress statements and for particular discovery. The defendant's motion to suppress was based upon an alleged violation of the right to counsel, when the officers allegedly interrogated the defendant after he asked to speak to his lawyer. The discovery motion to dismiss was based upon a request from counsel for all of the records in the City Engineering Department relating to the intersection where the accident took place. The de-

fendant was retried after a hung verdict and convicted.

The defendant appealed from the Seattle Municipal Court, a court of limited jurisdiction, to the Superior Court of King County. The Rules of Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) provide that an appellant must provide a written transcript of the portions of the tape-recorded record in the trial court which are pertinent to the appeal. RALJ 6.3A.[1]

The defendant prepared and filed a partial transcript that included only those portions of the trial court record relating to the discovery motions. The Superior Court ruled that the record was insufficient to decide any of appellant's

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[1]The appendices referred to have been lodged, by separate cover, with the Clerk of Court.

issues other than the discovery issue. At argument on the appeal, the Court denied an oral motion to supplement the record. Decision on RALJ appeal, Appendix A at 10. When the defendant filed a motion to reconsider in the Superior Court, he included a transcript of the motion to suppress statements based upon the defendant's request for a lawyer. The motion for reconsideration was denied and the defendant's failure to perfect the record on appeal remained as the reason the Washington Appellate Courts could not decide the counsel issue on its merits.

The circumstances surrounding the motion for discovery are reflected in the transcripts Appendix B. On April 13 and 14, defense counsel executed two subpoenas duces tecum without judicial

approval. Appendix C at 1-4. On May 4, 1988, at a pretrial hearing, defense counsel made motions to depose the police officer, "witnesses," and city engineers. The motions were denied because the defense attorney had not attempted to contact the witnesses. The Court asked that the defense attempt to obtain the information. Appendix B at 2. Defense counsel made no subsequent attempt to seek the information on her own as the Court requested.

A motions hearing was held on May 19, 1988, 2:30 p.m., Seattle Municipal Court, Department 2, before Judge Pro Tem David Laidman. Defense counsel raised no discovery issues at this hearing. Also on May 19, 1988, defense counsel went to another department and had Judge Pro Tem Mary E. Ramey sign a subpoena duces tecum

and notice of deposition, ex parte, to depose the same witnesses as listed in the order on pre-trial hearing form. Appendix C at 7-8.

The subpoena duces tecum was not stamped "received" by anyone. The subpoena duces tecum was captioned "In The Superior Court For The State Of Washington For King County." Id. The deposition was scheduled for May 27, 1988, at 10:00 a.m. Id.

On June 3,1988, Judge Kessler ordered the City to comply with the discovery request by June 8, 1988. Appendix B at 49-50.

The City Attorney's Office spent three days contacting the Engineering Department and gathered all the relevant information in the Engineering Department, including a list of all the accidents at

the location, the dates and the description of signs existing at that location. This information was provided to the defense attorney on June 8, 1988. Appendix B at 52-53. On June 17, 1988, defendant moved to dismiss, arguing that discovery was incomplete. Defense counsel had not contacted the City Attorney's Office between June 8 and June 17. The motion was denied. Id. at 55-56.

On August 11, 1988, defendant again moved to dismiss. The transcript of that hearing shows the City's efforts to comply. Appendix B at 59-67. The prosecutor called Mr. Thordason from City Engineering and told him to cooperate with defense counsel when she called, to comply with her requests and to give her whatever information she requested. Id. at 61. The prosecutor offered to go with

defense counsel in person to the Engineering Department to get the requested materials. Id. at 60-61. On August 11, 1988, the prosecutor offered to go with defense counsel that very minute to the Engineering Department. Defense counsel declined. Id. at 66-67.

The inadequate record on appeal provided by appellant prevents the City from submitting any further counterstatement of the facts and procedure.

II. ARGUMENT WHY CERTIORARI SHOULD BE DENIED.

A. The Washington Appellate Courts Did Not Err In Denying Review Of An Issue With No Record.

1. The Defendant's Failure To Provide An Adequate Record On Appeal Precludes Review.

In Washington, the defendant, as appellant, was required to transcribe the lower court proceedings that

were "necessary to present the issues raised." RALJ 6.3A(c). RALJ 6.3A(a) provides:

> Unless the superior court orders otherwise, the appellant shall transcribe the electronic recording of proceedings as provided in section (C) of this rule. The transcript shall be filed and served with the appellant's brief.

The party seeking review of a lower court decision has the burden of perfecting the record on appeal so that the reviewing court has before it all of the evidence relevant to the issue raised. *State v. Rienks*, 46 Wn.App. 537, 731 P.2d 1116 (1987); *State v. Garcia*, 45 Wn.App. 132, 140, 724 P.2d 412 (1987); *State v. Jackson*, 36 Wn.App. 510, 676 P.2d 517, *aff'd*. 102 Wn.2d 689, 689 P.2d 076 (1984). Without a complete appellate transcript it is not possible to review the lower court proceedings to determine

whether prejudicial error occurred. *Seattle v. Boulanger*, 37 Wn.App. 357, 688 P.2d 67 (1984). The Washington Supreme Court and Court of Appeals have consistently refused to decide issues in cases where an inadequate record has been provided for review. See, *e.g.*, *State v. Blight*, 89 Wn.2d 38, 569 P.2d 1129 (1977); *Seattle v. Boulanger, supra*; *State v. Murphy*, 35 Wn.App. 658, 669 P.2d 1129 (1987). In *State v. Allen*, 88 Wn.2d 394, 562 P.2d 632 (1977), the Washington Supreme Court denied review of the appellant's challenge to the sufficiency of the evidence leading to his criminal conviction because the transcript on appeal failed to contain a record of the facts presented at trial. Similarly, in *State v. Blight, supra*, the Supreme Court refused to hear the defendant's assignment

of error which required a review of the facts because no report of proceedings had been filed by the defendant.

The defendant listed three assignments of error for discretionary review. All of the issues required completed transcription of the trial court proceedings in order for the issues to be resolved. Without a transcript of his arraignment, pretrial hearing and trial, the appellate courts were unable to decide these issues. Therefore, this Court should be limited to the issue concerning the discovery violation since that was the only issue resolved by the Superior Court, and considered by the Court of Appeals, and the Supreme Court of Washington.

2. Any Alleged Violation Of The Right To Counsel Does Not Warrant Review.

The defendant filed a motion to reconsider the court's decision in the Superior Court, which was the first appellate review of this case. In that motion the defendant appended a partial transcript of a hearing regarding the motion to suppress statements. The Superior Court had previously rejected a motion to supplement the record with that transcript, RALJ decision, Appendix A-10. However, the transcript of the May 19, 1988 hearing, Appendix B at 3-46, reveals another sound basis for this Court to deny review.

The transcript reflects that after arrest, the defendant asserted his right to counsel and to remain silent. The officers waited some time then requested

the defendant to submit to a breath-testing devise. After admonishments as to the repercussions of refusal, the defendant refused to take the test and then responded to questions by the officers, without counsel present and without new *Miranda* warnings. Defendant asserts these statements were admitted at trial.

Similar fact patterns have been reviewed and decided upon by this court. See, *e.g.*, *Connecticut v. Barret*, 479 U.S. 523, 93 L.Ed.2d 920, 1075 S.Ct. 828 (1987); *Oregon v. Bradshaw*, 462 U.S. 1039, 77 L.Ed.2d 405, 103 S.Ct. 2830 (1983); *Wyrick v. Fields*, 459 U.S. 42, 74 L.Ed.2d 214, 103 S.Ct. 394 (1982); *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378 101 S.Ct. 1880 (1981), *rehearing denied*, 452 U.S. 973, 69 L.Ed.2d 984, 101 S.Ct. 2138. The facts

in this case do not present a novel pattern that would advance or clarify present federal case law.

This is particularly true considering the disjointed and confusing state of the record presented for review. The additional transcript submitted regarding the motion to suppress does not contain the findings, conclusions or rulings of the trial court at the hearing. Neither has counsel filed or otherwise presented a transcript of the trial court wherein these statements were allegedly admitted into evidence. Certiorari should be denied because the facts surrounding the alleged violation of the right to counsel are neither novel nor clearly presented.

B. The Trial Court Did Not Err By Denying Defendant's Motion To Dismiss Based On An Alleged Discovery Violation.

1. The discovery evidence was not material.

The scope of discovery and the granting or denial of sanctions for failure to comply with discovery requests are matters within the sound discretion of the trial court, *United States v. Williams*, 791 F.2d 1383 (9th Cit. 1986); *State v. Tyler*, 77 Wn.2d 726, 736, 466 P.2d 120 (1970); *State v. Lauterback*, 33 Wn.App. 161, 168, 653 P.2d 1320 (1982), *rev. denied*, 98 Wn.2d 1013 (1983), reviewable only for manifest abuse of discretion. *State v. Krausse*, 10 Wn.All. 574, 576, 519 P.2d 266 (1974); *State v. Laureano*, 101 Wn.2d 745, 762 682 P.2d 889 (1984). Nevertheless, dismissal of charges remains an extraordinary remedy, *State v. Baker*, 78 Wn.2d 327, 332, 474 P.2d 254 (1970), and is appropriate only if lesser sanctions would not give the

defendant a fair trial. *State v. Whitney*, 96 Wn.2d 578, 580, 627 P.2d 956 (1981); *State v. James*, 26 Wn.App. 522, 524, 614 P.2d 207 (1980). To support a dismissal within this discretionary power conferred upon the trial court, the record must show governmental misconduct or arbitrary action together with actual prejudice to the defendant. See, *State v. Bradfield*, 29 Wn.App. 679, 630 P.2d 494 *rev. denied*, 96 Wn.App. 1018 (1981); *State v. Laureano, supra*.

Here, the record fails to show any prejudice to the defendant or any governmental misconduct by the City. The purpose of discovery is to protect against surprise, allowing the defendant to anticipate the prosecutor's arguments and prepare an adequate defense. *State v. Brush*, 32 Wn.App. 445, 455, 648 P.2d 897

(1982), *rev. denied*, 98 Wn.2d 1017 (1983). It cannot be contended here that the defendant would be unfairly surprised by the City's evidentiary presentation.

The applicable criminal discovery rules in the instant case are Seattle Municipal Court Local Rule (SMCLR) 4.7 and Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) 4.7.

SMCLR 4.7 requires that the plaintiff mail discovery to the defendant after defendant has requested the discovery accompanied by a self-addressed stamped envelope. Failure to provide this discovery "shall result in a motion to compel or terms." It does not contemplate dismissal.

The discovery provisions of CrRLJ 4.7 require the prosecution to disclose any material or information within his know-

ledge which tends to negate defendant's guilt. CrRLJ 4.7(3). In conclusion, the rule states:

> The prosecuting authority's obligation under this section is limited to material and information within the actual knowledge, possession or control of members of his or her staff. CrRLJ 4.7(4)

CrRLJ 4.7(d) addresses materials held by others.

> Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting authority shall attempt to cause such material or information to be made available to the defendant. If the prosecuting authority's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

Applying the rules to the facts of this case, it is apparent that the three

judges below did not err by refusing to dismiss the case.

There was no showing that any of the undisclosed information was material. The undisclosed information was of minimal value to the defendant, therefore, the failure to disclose did not cause substantial prejudice to defendant.

Reversal for non-compliance with CrRLJ 4.7 arises from an abuse of discretion by the trial court or some substantial injury to defendant. *State v. Vavra*, 33 Wn.App. 142, 144, 652 P.2d 959 (1982). (Citation omitted.) There was no showing that the evidence, if made available, might exculpate the accused as required by *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

Further, a conviction need not be set aside unless the prosecution has failed

to disclose evidence which is of sufficient significance to amount to a denial of the right to a fair trial. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976):

> If the omitted evidence creates a reasonable doubt that did not otherwise exist constitutional error has been committed ... The omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.

State v. Ervin, 22 Wn.App. 898, 905, 594 P.2d 934 (1979).

The entire record cannot be evaluated here because of appellant's failure to properly transcribe the trial court proceedings. Nonetheless, the omitted evidence would not have created a reasonable doubt that did not otherwise exist because the information about accidents at the same location was neither material

nor relevant. The elements of the crime of DWI do not include bad driving, therefore, evidence of other accidents is not material. Further, evidence of the conditions of the street, lighting and factual information of other accidents at the location would not be relevant or connected to the defendant's driving onto a curb and into a guard rail.

Because the accident-related evidence sought by defendant was neither material nor otherwise admissible, this is not an issue that should be reviewed.

2. <u>There was no prosecutorial misconduct regarding discovery of evidence</u>.

The chronology of events regarding discovery reveals that the three judges in the trial court who denied defendant's motions to dismiss ruled correctly. On March 28, 1988, de-

fendant filed a Notice of Appearance, Demand for Jury Trial and Demand for Discovery. Defendant's arraignment was set for March 30, 1988, 9:00 a.m. Seattle Municipal Court, Department 1.

On April 14 and 15, 1988, defense counsel executed two subpoenas duces tecum without judicial approval which is required by CrRLJ 4.6(a). Appendix C at 1-4. As a result, the subpoenas duces tecum were without legal significance. On May 4, 1988, a pretrial hearing was held. Defense counsel made motions to depose the police officers, "witnesses" (whomever they might be) and City engineers. The motions were denied because defense counsel had not attempted to contact the witnesses first. See, Appendix C, trial court's notations in margins of pre-trial order, at 6. The trial court

noted that all accident reports, complaints, and repairs to the street at or near the intersection where the accident occurred were available at the City Engineering Office. The judge told defendant to go get the discovery himself which is permitted under CrRLJ 4.7(4). The materials requested by defendant were not within and the actual knowledge, possession or control of the prosecutor or his staff. Appendix B.

A motions hearing was held on May 19, 1988, 2:30 p.m., at Seattle Municipal Court, Department 2. There is no record that defense counsel made any discovery motions. See, Appendix C, page 1 of court docket at 9. The record does reflect that the defendant went to a different judge on May 19, and had a notice of deposition and subpoena duces tecum

signed by Judge Pro Tem Mary E. Ramey. Appendix C at 7-8. This request was not raised in Department 2, where the prosecutor would have had the case file and familiarity with the case. The subpoena duces tecum was not received by the Seattle City Attorney's Office. The only indication that the subpoena duces tecum was served at all appears in defendant's motion for dismissal and declaration of counsel, attached as Appendix C at 10-14, which states that the subpoena was served on May 25, 1988, on the Mayor's Office and the Law Department. The subpoena, however, does not bear a copy received stamp. The caption on the subpoena duces tecum listed the Superior Court not Municipal Court. The subpoena duces tecum was not served to the proper party. The deposition date, pursuant to

the subpoena duces tecum, was set on May 27, 1988, less than two days after the defendant claims notice of the hearing was served. CrRLJ 4.6(b) requires reasonable written notice of the time and place for taking the deposition. Less than two days notice of a deposition is not reasonable notice. See, Civil Rule (CR) 30(b)(1).

Defendant's first motion to dismiss for the alleged discovery violation was three days after the City received notice of the subpoena duces tecum. On June 3, 1988, Judge Kessler ordered the City to comply with the subpoena duces tecum by June 8, 1988. Appendix B at 50.

The Prosecutor's Office spent three days contacting the Department of Engineering and gathered all the information the Engineering Department had, including

a list of the accidents at that location, the dates, and the description of signs existing at the location. This information was provided to the defense attorney on June 8, 1988. Appendix B at 52. The City had substantially complied with the discovery request.

On June 17, 1988, defense counsel made a second motion to dismiss, arguing that the discovery was incomplete. Defense counsel had not contacted the Prosecutor's Office between June 8 and June 16 to inform them of the alleged inadequacy of the released materials. The defense motion to dismiss was denied. Besides providing defendant with the requested materials on June 8, the prosecutor took the following action attempting to aid the defendant in receiving more discovery.

On July 20, 1988, the prosecutor called Mr. Thordason from Engineering and told him to cooperate with defense counsel when she called, to comply with her request, to give her any information she needed and to call him if there were any problems. Appendix B at 60. He tried to put defense counsel and the Engineering Department people in contact with each other but defense counsel failed to contact the Engineering Department. Id. at 61.

The City offered before trial to go to the Engineering Department personally with defense counsel to get whatever information she felt she was entitled to. Id. at 60-61. Defense counsel was not responsive to this offer. Id. On August 11, 1988, the prosecutor offered to go with defense counsel that very minute to

the Engineering Department and get whatever documents she thought she wanted. Defense counsel apparently rejected this offer also. Id. at 66.

The Prosecutor's Office did all it could to get the defendant the requested discovery. There was simply no violation of the discovery rules. Defendant has not shown that any reasonable person would not have taken the same action that Judges Madsen, Kessler, and Yanick did in denying defendant's motions to dismiss based on alleged discovery violations.

F. CONCLUSION.

Review of this case should be denied. The Superior Court, Court of Appeals, and Washington Supreme Court correctly assessed the merits and record of this appeal. The defendant failed to supply an adequate record for review of

substantive issues and failed to establish the materiality of the discovery requested but allegedly not received. The defendant has not stated any issues or facts that would qualify this case for review and the City urges this court to deny certiorari.

Respectfully submitted this 28th day of August, 1990.

MARK H. SIDRAN
City Attorney

Michael J. Finkle

MICHAEL J. FINKLE,
Washington Bar No. 17911
Assistant City Prosecutor